

U.S. Department of Labor

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Issue Date: 05 March 2007

CASE NO.: 2006-LHC-00685

OWCP NO.: 02-144339

In the Matter of

C.P.,

Claimant,

v.

MODERN CONTINENTAL CONSTRUCTION,

Employer,

and

NATIONAL UNION FIRE INS. CO. OF PITTS.,

Carrier.

Appearances: Timothy F. Schweitzer, Esq.,
for Claimant

Robert N. Dengler, Esq.,
for Employer

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S. § 901 et seq. ("the Act"), and the regulations promulgated thereunder. A hearing was held before me in New York, New York on August 1, 2006. On October 25, 2006, Claimant filed a post-hearing brief. Employer filed a post-hearing brief on October 26, 2006. The following decision is based upon analysis of the record, the arguments of the parties and the applicable law.

STIPULATIONS

The parties have stipulated to the following:

1. Claimant was injured on September 26, 2005 in an accident at his work place in New York, New York.
2. Claimant suffered multiple injuries in the September 26, 2005 accident.
3. Claimant and Employer were in an employer-employee relationship at the time of the September 26, 2005 accident.
4. The accident occurred in the course and scope of Claimant's employment with Employer.
5. Employer was timely notified of Claimant's accident.
6. Employer timely filed a first report of injury (form LS-202) with the United States Department of Labor.
7. Claimant timely filed a claim for compensation (form LS-203) with the United States Department of Labor.
8. Carrier timely filed a notice of controversion with the United States Department of Labor.
9. Since the accident, Carrier has paid Claimant temporary total disability compensation benefits under the New York Workers' Compensation Law at the maximum statutory rate of \$400.00 per week.
10. Carrier has provided medical benefits under the New York Workers' Compensation Law.
11. Claimant currently is temporarily totally disabled due to the injuries sustained in the September 26, 2005 accident. Claimant remains in need of additional medical care.

ISSUES

The sole issue presented for decision in this case is whether Claimant's September 26, 2005 injury is covered under the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

1. Claimant's Background

Claimant testified at a deposition on July 26, 2006 in New York, New York and at the hearing on August 1, 2006. Claimant was born on January 30, 1965 in Hempstead, New York. JX 21 at 7-8.¹ Claimant is divorced and has one child, an eight year old daughter. JX 21 at 7. He graduated from high school in 1983 and has no additional formal education. JX 21 at 8. After graduation, Claimant held a variety of jobs including warehouse worker, gas station attendant, and mechanic. JX 21 at 9-10. In 1997, Claimant joined the Teamsters, and worked on roadwork projects for Cross Ready Mix, and drove a truck F.W. Sims. JX 21 at 16-17. Claimant has worked for Employer on various projects, including working on the Long Island Expressway, on a cogeneration plant in Shoreham, and replacing a bridge on Woodhaven

¹ The following abbreviations are used herein: "JX" refers to Joint Exhibits and "Tr." refers to the transcript of the August 1, 2006 hearing.

Boulevard. JX 21 at 15-16. Additionally, Claimant was a professional wrestler from 1990 to 1991. JX 21 at 22-23.

Claimant was working for Employer at the Fountain Avenue Landfill when he was injured on September 26, 2005. Tr. at 10; JX 21 at 14. He had been working on the project for approximately three years. The Fountain Avenue Landfill project involved changing a landfill into a park. Tr. at 10; JX 21 at 24. To create the park, the landfill is being covered with materials brought to the site by a barge through Jamaica Bay. A smaller, “material barge” brings the necessary material to a larger “work barge” where the material is offloaded.² JX 21 at 26. Bulldozers are used to place the material around the site to its final location. JX 22 at 10. In addition, a pier had to be built to allow access to the material for the project, because the vessels bringing the material needed to be unloaded in deeper water. JX 22 at 12.

Claimant worked as a Euclid³ operator and was responsible for getting the Euclid loaded with material on a barge, and then taking the material to the landfill area to stockpile. Tr. at 15; JX 21 at 25. Claimant would drive the Euclid onto a barge and an excavator would load the truck from materials located on another, smaller barge. Tr. at 12; JX 21 at 27. Once Claimant’s Euclid was loaded, he drove the materials to a holding or stockpile area, unloaded the material and then repeated the process. Tr. at 21. The material in the stockpiles would be spread by bulldozers and payloaders or moved again by Euclid to another pile. Tr. at 23. Claimant frequently would move material from the stockpiles to another location. Tr. at 24.

The project required the construction of a bridge to the “work barge”. When the bridge was first placed onto the “work barge,” several problems arose because the bridge was unstable. Tr. at 16. Claimant was concerned about driving over the bridge because the bridge would bounce with the current. Tr. at 30. Claimant was instructed to drive his truck onto the “work barge” in first gear to prevent rocking the bridge and “work barge”. Tr. at 16. Ballasts were also placed on the “work barge” to reduce the number of repairs on the bridge. Tr. at 32. Prior to the addition of the ballasts, the bridge needed to be repaired once or twice daily. Tr. at 32. The truck drivers and the dock-builders collaborated to find a solution to the bridge problem, which they resolved by combining the concrete pier at one end and the ballasts at the other. Tr. at 33. Despite the problems, the Euclid trucks have never been prevented from traveling across the bridge for the last six years. Tr. at 31.

On September 26, 2005, Claimant had loaded his truck and was waiting for the bridge leading off of the barge to be clear of other trucks. While he was waiting, Claimant decided to use the bathroom located on the barge. Tr. at 19-20. As he descended the steps of his truck, his right foot became caught between the last step and the mud flap. Claimant lost his footing and fell backwards. Tr. at 20; JX 21 at 36. With his right foot caught, Claimant’s left shoulder,

² At the hearing, Claimant referred to the barge onto which he drove his truck as “the work barge.” Employer did not object to the term for the purpose of testimony but asserted that its position is that the structure in question is a dock. Claimant referred to the other barges as “material barges.” Tr. at 13-14, 18. The terms “work barge” and “material barge” are used throughout the summary of evidence to refer to the structure on which Claimant was injured and the structure used to bring in additional materials respectively.

³ A Euclid is an oversize dump truck. Tr. at 11.

elbow, and side hit the ground. Tr. at 20; JX 21 at 38. The foreman came to Claimant's assistance. JX 21 at 38. Because Claimant's ankle was already noticeably swollen, the foreman told Claimant he needed to go to the hospital. An ambulance was not offered to Claimant and he did not ask for one, but instead drove himself to the hospital. JX 21 at 39-41. Claimant was treated and released from the hospital that day. Id.

The day after the injury, Claimant was examined by Dr. Arshelito and referred to Central Orthopedic Group. JX 21 at 42. Claimant was treated by Dr. Scarpenato for his injuries and by Dr. Fine for pain management. JX 21 at 43. Dr. Scarpenato performed surgery on Claimant's left shoulder but he continues to experience problems with the shoulder and has limited mobility. JX 21 at 45. Claimant still sees Dr. Scarpenato approximately once a month. JX 21 at 44. Additionally, Dr. Fine continues to treat Claimant and recommends that Claimant undergo epidural injections for his back pain. JX 21 at 43. Claimant takes Oxycontin for his pain three to four times a day. JX 21 at 44. Dr. Scarpenato also referred Claimant to Dr. Mansuri for treatment of his ankle, which has excessive swelling. JX 21 at 46. Dr. Mansuri has told Claimant he needs surgery for his ankle but Claimant is awaiting approval from the insurance company. JX 21 at 46. Additionally, Claimant has three bulging discs and two herniated discs in his back and numbness in his right leg from sciatica. JX 21 at 48-49.

2. The Work Site and "Work Barge"

John DelVecchio, general superintendent of the project, testified regarding the project on behalf of Employer at a deposition on July 26, 2006. JX 22.⁴ Mr. DelVecchio manages all of the construction at the project and is responsible for meeting deadlines relating to the project, which is anticipated to be completed by June 2007. JX 22 at 9. Because material cannot be delivered to the site over land, it must be brought by barge through Jamaica Bay. JX 22 at 32. A "material barge" contains the material needed for the project, which is unloaded at the "work barge". JX 22 at 14. Mr. DelVecchio testified that the only purpose of the "work barge" is to unload material. JX 22 at 32. He considers the "work barge" "an extension of land." Id.

The "work barge" was brought to the landfill site in 2001 by tugboat through Jamaica Bay. The "work barge" was secured and has not been moved since 2001. Tr. at 15-16; JX 21 at 31-32. Four spuds hold the "work barge" in position at each corner. The spuds pass through the barge and are anchored to the bottom of the bay. This allows the barge to float on the water and rise and fall with the tide. JX 22 at 19-20; Tr. at 16-17. A bridge connects the "work barge" to a concrete pier on the shore. Tr. at 25. The bridge is not attached to the "work barge" but sits on a pedestal on the barge and rises and falls with the tide as the barge does. JX 22 at 25. The bridge is bolted to the concrete pier, which keeps the bridge at a certain level to allow the trucks to travel over it during different tides. JX 22 at 25; Tr. at 28-29. This configuration is designed for the "work barge" to stay in place until the end of January 2007. JX 22 at 19. When the job is completed, the spuds will be picked up and the "work barge" will sail to another location. JX 22

⁴ Although Mr. DelVecchio testified on behalf of Employer, he stated he does not work for Employer. He is employed by Cashman Construction, which oversees the project on behalf of the bonding company.

at 20. Disassembling the spuds and moving the “work barge” will take at least one week. JX 22 at 27-28.

3. Other Evidence

The parties submitted the following other evidence into the record:

Photographs of the work site. JX 1-20.

B. Discussion

Claimant’s September 26, 2005 injury is covered by the Act.

Generally for a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§ 902(3), 903(a). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the “situs” and the “status” requirements of the Act. Id.

a. Situs

Section 903(a) of the Act provides coverage for a disability resulting from an injury that occurs on the navigable waters of the United States. § 903(a). Prior to 1972, the Act covered only injuries occurring on “navigable waters.” In 1972, Congress amended the Act by expanding the situs requirement to include “any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” § 903(a).

In the instant case, Employer argues Claimant cannot satisfy the situs requirement because Claimant was not injured on navigable waters. Employer asserts that Claimant was injured on a structure that Employer maintains is permanently affixed to the shore, and which Employer characterizes as an “extension of land”. Emp’s Br. at 11. Claimant argues that the structure on which he was injured was floating on navigable waters, is not permanently connected to land, and is not an extension of land. Clmnt’s Br. at 6-10. Therefore, Claimant’s injury occurred on navigable waters, thus satisfying the situs requirement of the Act.

The Second Circuit has recently addressed the issue of whether floating structures are considered to be on navigable waters. Lockheed Martin Corp. v. Morganti, 412 F.3d 407, 409 (2005).⁵ In Morganti, a worker drowned after falling into the Cayuga Lake while untying a shuttle boat from a research barge. Morganti, 412 F.3d at 409. The petitioners argued that the research barge was a fixed platform akin to an artificial island and could not be on navigable waters. Id. However, the court distinguished between floating platforms and fixed platforms

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because Claimant’s employment took place in New York.

stating that with a fixed platform, the “seabed, rather than buoyancy principle must provide fundamental support.” Id. at 414. The barge was connected to the lakebed by mooring buoys that anchored into the lakebed. Id. at 415. Much like an anchored or moored ship, a barge connected in this way would not be protected from sinking in the way that a fixed platform is protected. Id. The court concluded that a floating object cannot be a fixed platform or artificial island. Id. at 414 (citing Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 363 n. 9 (1969) (a fixed platform does not touch the water except for legs which go through the water and into the ground)). Thus, the court held “a person on any object floating in actual navigable waters must be considered to be on actual navigable waters.” Id. at 416.

Similarly, the Benefits Review Board (“the Board”) considered whether a worker injured on a floating barge was covered under the Act. Caserna v. Consolidated Edison Company, 32 BRBS 25 (1998). In Caserna, the claimant was injured while working on a barge floating in the Upper New York Bay. The barge had two spud beams affixing it to a pier. The barge could be disengaged from the pier and moved by tugboat to other locations or dry dock as necessary. The Board found that the barges were floating structures that were not permanently connected to land. Therefore, the Board concluded that because the claimant was injured on a barge afloat on navigable waters, he was injured on navigable waters, thereby satisfying the situs requirement of Section 3(a). 32 BRBS at 28.

Employer relies heavily on cases from the Fifth and First Circuits for the proposition that a “floating dock” is an extension of land.⁶ In Travelers Insurance Company v. Shea, 382 F.2d 344 (5th Cir. 1967), a worker was injured on a “floating outfitting pier”. Id. at 345-46. The court observed that structures such as piers, wharves, or other “extensions of land” permanently affixed to the shore have been held to be extensions of land that are outside of the coverage of the Act. Shea 382 F.2d at 345. The pier in Shea was approximately 900 feet long and permanently anchored to the shore and bottom of the Sabine River and had been so situated for over eighteen years. Id. at 349. The court found that the structure was an “extension of land” and denied coverage under the act. Id. Applying Shea, the Fifth Circuit subsequently ruled that a worker injured upon a pier erected on pilings and concrete blocks resting on the bed of navigable waters of the United States was not entitled to coverage under the Act. Nicholson v. C.D. Calbeck, 385 F.2d 221, 222 (5th Cir. 1967). Employer also relies on a case arising in the First Circuit Court of Appeals that addressed the issue of whether the plaintiff had a seventh amendment right to jury trial because the claim arose under common law and not admiralty. South Port Marine, LLC v. Gulf Oil Ltd. Partnership, 234 F.3d 58, 64 (1st Cir. 2000). The court in that case concluded that a floating dock was “an extension of land” within the meaning of traditional admiralty law. Id.

I find that the decision in South Port Marine, supra., has little bearing on my determination of situs in the instant matter. The court in that case was addressing the issue of whether a tort occurring on a pier gave rise to a right to a jury trial because it “constituted an action at law, rather than in admiralty, in the late eighteenth century.” 234 F.3d at 64. In doing

⁶ As the instant case arises under the jurisdiction of the Second Circuit, the cases from the Fifth and First Circuits are not controlling.

so, the court looked at admiralty law, and did not contemplate the meaning of navigable waters pursuant to § 903(a) of the Act.

Further, I find that the structure involved in the instant matter is not comparable to the structures involved in Shea and Nicholson. The “floating dock” in Shea was permanently anchored to the land and had been so for eighteen years. Nothing in the facts of that case suggests the “floating dock” was temporary or scheduled for removal. Additionally, the pier in Nicholson was not floating on water at all. The pier was erected above the waters and was high enough to allow a canoe to navigate under it. Nicholson, 385 F.2d at 222. Employer’s “work barge” most closely resembles the floating structures of Caserna and Morganti. As with the barges in those cases, this structure is not permanently affixed to the land. The “work barge” is joined to land by a bridge, and is scheduled for removal and relocation at the completion of the project at the Fountain Avenue Landfill. While the barge has four spud beams passing through it at each corner, the spud beams prevent lateral movement and do not support the structure from underneath. It floats on the water and freely rises and falls with the tide and is supported only by the buoyancy principle of the water and ballasts added for stability. Therefore, I find that the structure on which Claimant was injured is floating on the navigable waters of the United States. Consequently, I find that Claimant was on navigable waters when he was injured and has satisfied the situs requirement of § 903(a) of the Act.

b. Status

Under Section 2(3) of the Act, “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker...” is covered by the Act. The 1972 amendments expanded the situs requirements to include specified adjoining areas. § 903(a). The U.S. Supreme Court has emphasized that Congress did not intend this expansion of situs to cover all workers “who breathe salt air.” Herb’s Welding v. Gray, 470 U.S. 414, 423 (1985). In National Marine Terminal Company v. Caputo, the Court noted that the legislative history reflected an “intent to cover those workers involved in the essential elements of unloading a vessel” and to exclude “persons who are on the situs but are not engaged in the overall process of loading and unloading vessels.” 432 U.S. 249, 267 (1977). The Court concluded the Act covers “those workers on the situs who are involved in the essential elements of loading and unloading.” Herb’s Welding, 470 U.S. at 423. Additionally, the Court has recognized coverage extends to those land-based workers who are engaged in the “intermediate steps of moving cargo between ship and land transportation.” P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 82-83 (1977). Generally, status is satisfied where a claimant is engaged in work that is integral to the loading, unloading, constructing, or repairing of vessels. Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989).

Additionally, the Court considered the meaning of “maritime employment” under Section 2(3) of the Act when the worker has been injured on actual navigable waters. Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983). In Perini, a construction worker was injured while working on a cargo barge used to unload materials for a building project. 459 U.S. at 299. Reviewing the legislative history of the 1972 amendments, the Court found that Congress intended to consistently provided coverage to any worker injured while working on

navigable waters in the course of his employment without inquiry into the nature of his duties. Id. at 311. The Court emphasized that the legislative history did not suggest that Congress intended that “an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered.” Id. at 318-19. Consequently, the Court determined that an individual would have been covered under the Act prior to 1972 because he was injured on navigable waters. Id. Therefore, a worker injured on actual navigable waters in the course of his employment on those waters satisfies the status requirement of Section 2(3) and is covered under the Act, provided the worker is an employee of a statutory “employer,” and is not excluded by any other provisions of the Act. Id. at 324.

Employer argues that Claimant is a truck driver and truck drivers, generally, are not covered by the Act. Emp’s Br. at 7-8. “Employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transport are not covered by [the Act].” Caputo, 432 U.S. at 267; see also Dorris v. Office of Workers’ Compensation Programs, 808 F.2d 1362, 165 (9th Cir. 1987) (holding that a truck driver whose duties consisted of driving cargo between different harbors was not engaged in maritime employment). Employer asserts that Claimant merely picked up cargo from a pier and transported it to its final destination. Emp’s Br. at 9. Thus, Employer concludes, Claimant is not covered under the Act because he was not involved in “intermediate steps of moving cargo between ship and land transportation” and not engaged in maritime employment within the meaning of § 902(3). Id.

None of the cases on which Employer relies involves a claimant injured on actual navigable waters. As the Supreme Court explained, a worker is considered to be “engaged in maritime employment because [he is] required to perform employment duties upon navigable waters.” Perini, 459 U.S. at 324. Applying Perini, the Second Circuit concluded in Morganti that the claimant satisfied the status test because he was injured on navigable waters. 412 F.3d at 416. Additionally, the Board held in Caserna that a claimant injured in the course of employment on navigable waters satisfies the status requirement and is covered under the Act “[r]egardless of the nature of the work being performed...unless he is specifically excluded from coverage by another statutory provision.” 32 BRBS 25 (citing Perini 459 U.S. at 323-324). Therefore, Claimant’s position as a truck driver is not a material factor in determining status in the instant circumstances.

I find that Claimant was injured on actual navigable waters. No party contends that any of the enumerated exclusions under Section 2(3) or any other statutory provision applies to this matter. See, 33 U.S.C. § 902(3)(A)-(H). The parties have stipulated that Claimant was injured in the course of his employment. Therefore, I find that Claimant was injured in the course of his employment on the actual navigable waters of the United States. Accordingly, I find Claimant has satisfied the status requirement pursuant to § 902(3) of the Act.

ORDER

It is ORDERED that Employer:

1. Pay Claimant temporary total disability benefits related to the injuries he sustained in the accident of September 26, 2005 at the maximum statutory rate, through the present and continuing.
2. Pay Claimant any unpaid retroactive benefits, plus statutory interest.
3. Pay all medical expenses related to the treatment of the injuries sustained in the accident of September 26, 2005.
4. Employer is entitled to a credit for all benefits previously paid.
5. Pay Claimant's attorney's fees subject to approval of a duly submitted petition for such fees.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey